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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re GREGORY ALLEN SHUMATE

on Habeas Corpus.

B224608

(Los Angeles County
Super. Ct. No. BH006340)

APPEAL from an order of the Superior Court of Los Angeles County, Peter Paul Espinoza, Judge. Reversed.

Kamala D. Harris and Edmund G. Brown, Jr., Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Phillip J. Lindsay and Linnea D. Piazza, Deputy Attorneys General, for Appellant.

Nancy J. Tetreault, under appointment by the Court of Appeal, for Respondent.

I. INTRODUCTION

John W. Haviland, Warden of the California State Prison at Solano, appeals from an order granting inmate Gregory Allen Shumate's habeas corpus petition. The trial court vacated a Board of Parole Hearings (the Board) determination Shumate was unsuitable for parole. We reverse the trial court's order and reinstate the Board's decision.

II. BACKGROUND

In September 1981, Shumate, who was 20, and a juvenile companion, Isaac Perkins, Jr., beat a man to death during a robbery that garnered them \$22. Upon his arrest, Shumate admitted he intended to rob the victim. On October 8, 1982, following a jury trial, Shumate was convicted of first degree murder committed during a robbery (Pen. Code, §§ 187, 211, 190.2, subd. (a)(17)). He was sentenced to 25 years to life in state prison.

On May 13, 2009, he came before the Board for the sixth time and was denied parole. The Board found Shumate posed a current risk of danger to the public because he failed to understand the nature and magnitude of the commitment crime, had not accepted responsibility for his role in the victim's death or his own criminality in general, and lacked genuine remorse. The Board further found Shumate had repeatedly exhibited behaviors that caused them to question his ability to withstand societal pressures and function within the law if released from prison.

III. DISCUSSION

A. Standard of Review

We review the Board's decision for some evidence Shumate continued to pose a threat to public safety. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1254; *In re Lawrence* (2008) 44 Cal.4th 1181, 1191, 1212.) "The Board's decision regarding parole suitability is subject to limited judicial review under the "some evidence" standard. ([*In re*] *Rosenkrantz* [(2002)] 29 Cal.4th [616,] 652.) The "some evidence" standard of review is 'extremely deferential.' (*Id.* at p. 665.) The reviewing court may not weigh the evidence, resolve conflicts in the evidence, or consider whether the evidence establishing suitability for parole 'far outweighs' the evidence showing unsuitability. (*Id.* at p. 677.) Thus, the court may not substitute its own judgment for that of the Board. '[T]he court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation.' (*Id.* at p. 658.) Review under the 'some evidence' standard 'simply ensures that parole decisions are supported by a modicum of evidence and are not arbitrary and capricious.' (*Id.* at p. 626.)" (*In re Bettencourt* (2007) 156 Cal.App.4th 780, 797-798.)

B. Some Evidence Supported the Board's Decision

1. Past and present mental state

Among the factors the Board considers in determining whether an inmate poses a current risk to public safety is the inmate's "past and present mental state" (Cal. Code Regs., tit. 15, § 2402, subd. (b)) "as it relates to [the inmate's] current ability to function within the law if released from prison" (*In re Lawrence, supra*, 44 Cal.4th at p. 1220, fn. 19). Here, the Board found that over the course of his post-conviction life, including at the parole hearing, Shumate had shown a pattern of reacting to authority and to

environmental stresses by becoming hostile, aggressive and argumentative. The Board concluded Shumate's demeanor and mental state militated against his ability to withstand societal pressures and function with the law if released from prison. The Board properly considered Shumate's counterproductive demeanor and behavior at the parole hearing in determining that given his past and present mental state he posed a current risk to public safety. (Cal. Code Regs., tit. 15, § 2402, subd. (b); *In re Loveless* (2011) 192 Cal.App.4th 351, 360 ["The Board was . . . entitled to assess the relevant factors in light of defendant's demeanor and behavior at the hearing"]; *In re Bettencourt, supra*, 156 Cal.App.4th at pp. 805-807 [psychological evaluations and inmate's behavior at parole hearing were some evidence supporting Board's unsuitability finding].) Moreover, as explained below, there was some evidence in support of the Board's findings.

Beginning as early as his post-conviction probation department interview, and continuing through the present parole hearing, Shumate repeatedly showed disrespect, aggressiveness, sarcasm, hostility, and irrationality when pressed by and in response to authority. During a 1982 post-conviction interview with a probation officer, Shumate was "sarcastic," "extremely hostile, and irrational." The probation officer noted: "The defendant was asked about his parental history and he stated 'none of the court's business.' The defendant was asked about any possible marital history and he stated 'married five times and I have 200 children.' The defendant was asked about his prior employment history and he stated 'vice-president of Billboard for the last five years earning \$25,000 a week.'" Shumate, who is Black, told the probation officer he was a member of the "'K.K.K.'" In the year following his arrest, Shumate became "outwardly hostile toward authorities."

During his incarceration, between 1985 and 2004, Shumate was repeatedly counseled for disobeying orders, displaying a negative attitude, and being disrespectful, belligerent, argumentative, confrontational and aggressive. He was generally nonreceptive of and nonresponsive to counseling. In November 1995 a psychologist found Shumate had "strong antisocial features." When pressed to explain the point at which he formed an intent to rob the victim, Shumate "became evasive, somewhat

hostile, defensive and tried to turn the questioning onto the examiner numerous times in an effort to [a]void dealing with his question.” Shumate denied he was a criminal and was “prideful, stubborn, and argumentative about accepting the label for himself as a ‘criminal.’”

During the present parole hearing, Shumate repeatedly interrupted Board members. He was argumentative and agitated. He exhibited “an inability to simply answer questions, to simply described [himself], to show that [he had] a mature comprehension of what [he is] about.” He laughed repeatedly during the Presiding Commissioner’s oral statement of the Board’s decision. The commissioners, who were present at the parole hearing and personally observed Shumate’s conduct, demeanor and manner of answering questions (see *In re Shippman* (2010) 185 Cal.App.4th 446, 484¹), described his conduct as “obfuscatory,” “argumentative,” “alarming,” “obstinate,” “obnoxious,” and “inexplicably aberrant.”

Presiding Commissioner Sandra Bryson described Shumate’s conduct as “alarming,” “obfuscatory,” and showing a lack of focus. “One could call it being obsessed with far-ranging detail. You shuffled your papers a lot. You did not directly answer questions. You answered in non-sequiturs . . . saying things that often did not even apply to the question asked. You exhibited today, sir, inexplicably aberrant [behavior] . . . [I]t is a lack of focus. It’s an inability to simply answer questions, to simply describe yourself, to show that you have a mature comprehension of what you’re about.” Presiding Commissioner Bryson concluded: “That kind of behavior [exhibited at the hearing] is displacing behavior, and it shows that you’re not ready to go out into society and withstand successfully the stresses that society is going to present to you. . . . We are concerned that you have, in all of this time, not come to a place where you can

¹ “When the Board conducts a parole hearing, it has the advantage of personally observing the inmate. From the individual’s demeanor or manner of answering questions, the Board may develop a concern as to whether the inmate is being forthright or providing rote responses that mask attitudes that reasonably can be anticipated to lead to violence upon release from prison.” (*In re Shippman, supra*, 185 Cal.App.4th at p. 484.)

directly deal with your criminality and with your mental state. As it was reflected then and as it exists now. You could not clearly do that today and that is why we feel that you remain a public safety risk.”

Deputy Commissioner Tom Goughnour commented: “[Y]ou kind of described yourself as an idiot at the time of the probation officer’s report that you’re obnoxious, obstinate, but I’m seeing a little bit of that today also. Okay? And that’s one of the things that concerns me. We’ve tried to be conducting a formalized hearing to get to some very specific issues, But it’s been difficult, so far, over this hour, because that idiot that you talk about back [post-conviction] when you were dealing with the probation officer, for some reason, I’m seeing some signs of that today” Deputy Commissioner Goughnour concluded: “[T]he court may determine that we have acted inappropriately based upon their perception, but I’ve seen you today, I have heard you today, the people in this room have seen you. We have had to stop the hearing so that you could go out and have a conversation with your attorney because of how you were comporting yourself, and I see many distressing similarities in how you were in 1981, in 1983, in 1995, and I see you in 2009” This was some evidence Shumate’s past and present mental state militated against his release.

2. Lack of insight and remorse

The Board also found Shumate lacked insight into the nature and magnitude of his offense, minimized his responsibility for the crime and for his criminality in general, and failed to demonstrate genuine remorse. (Cal. Code Regs., tit. 15, § 2402, subd. (d)(3); *In re Loveless*, *supra*, 192 Cal.App.4th at p. 360; *In re Lazor* (2009) 172 Cal.App.4th 1185, 1201-1202; see *In re Shaputis*, *supra*, 44 Cal.4th at p. 1260.) Some evidence supported those findings.

Shumate consistently downplayed his responsibility for the commitment offense. He attempted to paint himself in the best possible light with respect to the murder by claiming he had not known the co-perpetrator, Perkins, for very long, and it was Perkins,

not Shumate, who dealt the fatal blow. Shumate claimed that after robbing the victim he had walked away to urinate and upon return found Perkins hitting and kicking the victim who was lying on the ground. Shumate said he dragged Perkins away, but not before Perkins delivered a final kick to the victim's chest. An autopsy revealed the cause of the victim's death was blunt force trauma to the right chest area, which lacerated the liver. Shumate described himself as a naïve victim of Perkin's robbery plan.

In the aftermath of the crime, Shumate and Perkins boarded a public bus, behaved in a boisterous manner and harassed other riders, until the bus driver threw them off. Shumate admitted that when he boarded the bus he had no remorse whatsoever for what had just happened. Following his conviction, in 1982, a probation officer interviewed Shumate and concluded Shumate "failed to show any remorse."

In 1995, Shumate told a psychiatric evaluator he was heavily intoxicated when he committed the crimes, he did not intend to kill anyone, and he was the naïve victim of his co-perpetrator. He attributed his participation in the crime to the fact he was intoxicated and, at that point in his life, was a chronic drug abuser and simply a "fool" and a "jerk."

During the present parole hearing, Shumate declined to discuss the commitment offense. He deflected the Board's attempts to determine his state of mind in committing the crime.

Shumate similarly failed to acknowledge responsibility for his prison disciplinary record. He viewed himself as a victim of correctional officers who unjustly enforced petty rules against him because he was a young Black man and they did not like him. When confronted with his prison discipline record, Shumate "would minimize, argue, and defend that he was unjustly accused of these rules violation[s]" He claimed his disciplinary record was the result of personality conflicts and that this was indicative of problems in the prison system rather than his own behavior. Shumate stubbornly adhered to this perspective.

In 1995, a psychologist observed: "[Shumate] has done little to look at his long criminal history, drug addiction and general attitudes towards institutional rules and staff. Clearly distressing through much of this interview, was the fact that . . . Shumate had to

be figuratively beaten over the head and confronted with obvious facts of his criminality, his minimizing, his rationalizing, his justifying, placing himself in a good light numerous, numerous times and then appeared to budge little in the end. . . . The facts of the crime as presented by . . . Shumate continue to minimize, rationalize and justify the brutality of the crime and his participation in it. He appears essentially to deny responsibility for the crime while attempting to mouth the words of responsibility. His remorse appears superficial and he continually argues for his own self-interest and self-serving ends. [¶] Based on the current evaluation, . . . Shumate appears to present with a probable level of dangerousness, that appears similar to that when he entered prison”

Shumate also minimized his responsibility for his adult criminal conduct. He described his crimes as nonviolent. When asked to discuss his criminal history, Shumate gave the following explanations. A 1979 conviction for trespass and vandalism ensued after he got drunk and went inside a building to sleep. Both a 1980 shoplifting arrest and a 1980 petty theft conviction occurred because someone else in the store claimed Shumate was trying to steal something. He was convicted of dumping offensive matter after a police officer saw him kick over a trash can. A malicious mischief conviction resulted after he tried to get into a friend’s vehicle so he could sleep. During the parole hearings, Shumate told the Board he committed the foregoing crimes because he had no respect for himself and he was “just being an idiot,” a “fool,” and a “jerk.”

Shumate expressly denied he was a criminal. During his 1995 psychiatric evaluation interview, Shumate claimed he was a convicted felon, not a criminal. During the parole hearing, Shumate commented, “. . . I haven’t had a history of being a criminal unless I was basically under the influence of drugs and alcohol” The foregoing was some evidence Shumate failed to understand the nature and magnitude of the commitment offense and his own criminality, and he failed to demonstrate genuine remorse.

Because we conclude some evidence supported the Board’s decision, we need not address the warden’s additional argument that the superior court improperly limited the Board’s discretion on remand. The Board’s decision must be upheld and, accordingly,

the superior court's order granting Shumate's habeas corpus writ petition will be reversed. (*In re Bettencourt, supra*, 156 Cal.App.4th at p. 807.)

IV. DISPOSITION

The trial court's April 1, 2010 order granting the petition for writ of habeas corpus is reversed. The matter is remanded to the trial court with directions to enter a new order denying the petition.

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KUMAR, J.*

We concur:

ARMSTRONG, ACTING P. J.

KRIEGLER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.